United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

261

No. 24,873

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED AUTOMOBILE AEROSPACE, *et al.* WORKERS,

v.

NATIONAL LABOR RELATIONS BOARD,
Appellant.

On Appeal from an Order of the United States
District Court for the District of Columbia

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
GLEN M. BENDIXSEN,
Chief of Special Litgation,
THOMAS E. SILFEN,
Attorney,
National Labor Relations Board.

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AUTHORITIES CITED

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BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF ISSUE PRESENTED

Whether the District Court erred in refusing to remand the case to the Board for initial consideration of the Trial Examiner's rulings on the challenged ballots.

Pursuant to Rule 8(d) of the General Rules of this Court, the Board states that this case is before the Court for the first time.

REFERENCE TO RULINGS

This case is before the Court on an appeal of the National Labor Relations Board from an order and judgment of the District Court for the District of Columbia, issued on August 28, 1970 and not yet officially reported (A. 106-119, 125).[1]

STATEMENT OF THE CASE

A. The underlying events and the Board's decision

On March 29, 1968, a representation election was held among approximately 167 production and maintenance employees of the Thomas Engine Company (hereinafter referred to as Thomas). The tally showed 74 votes for the Union,[2] 76 against, and 7 ballots challenged (A. 5). Five of the challenges were by Thomas and two by the Union; in each case, the claim was made that the challenged voter was not an eligible employee (A. 40-51).[3]

On May 31, 1968, the Board's Regional Director issued his preliminary report on the challenges, recommending that a hearing be held to resolve certain difficult issues.[4] Before this hearing could be held, however,

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[1] "A." references are to the printed appendix.

[2] United Automobile, Aerospace and Agricultural Implement Workers, UAW.

[3] Specifically, the Union alleged that two voters (Byers and Stegmeir) were actually supervisors within the meaning of the Act; and Thomas contended that five voters (Wilkens, Dickey, Bratten, Coleman and Whitlock) had been permanently laid off prior to the election (A. 40-51).

[4] Accordingly, on August 14, the Regional Director directed a consolidated hearing on both the challenges and the unfair labor practice charges earlier filed by the Union against Thomas (A. 15).

Thomas completely terminated operations, transferring its assets to a new employer, the Upshur Engine Company (hereinafter referred to as Upshur) (A. 15, 51-54). Shortly thereafter, Upshur reopened the plant, but hired a complement of only 97 production and maintenance employees, 90 of these being former Thomas workers (A. 4, 52). The Board's General Counsel then amended the pleadings to name Upshur as the employer in the election proceeding and a respondent in the unfair labor practice case. After a number of continuances due to the change of ownership, the hearing was finally held, and on April 25, 1969, the Trial Examiner filed a decision recommending that 4 of the challenges (two by the Union and two by the employer) be sustained, that three (all by the employer) be overruled, and accordingly, that these three ballots – enough to affect the results of the election – should be opened and counted (A. 40-51).

Upshur filed exceptions to these recommendations with the Board, urging that the Trial Examiner erred both in overruling three employer challenges and in sustaining the two by the Union (A. 63-66). Similarly, the Union excepted to the Trial Examiner's rulings insofar as he sustained the two of the employer's challenges (A. 67). Acting on these exceptions, the Board issued a decision on December 12, 1969, stating at the outset that it "adopts the findings, conclusions and recommendations of the Trial Examiner only to the extent consistent herewith (A. 2)."[5] Thereafter, in the body of its decision, the Board recounted, purely as a matter of fact, the Trial Examiner's decision on the challenges – "that four challenges be sustained and that three ballots be opened (A. 5-6)." Then,

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[5] Upshur also had filed exceptions with respect to the Trial Examiner's finding of certain employee unfair labor practices. The Board's decision on these exceptions, modifying in part the Trial Examiner's order, has been appealed by the Union to the Court of Appeals for the Ninth Circuit and is presently set for oral argument on January 15, 1969. *U.A.W. v. N.L.R.B.* (C.A. 9, No. 25,706).

without expressing any substantive approval or disapproval of these rulings, the Board proceeded to hold that, because of the intervening sale of the business and the resultant alteration in employee complement, the original election no longer constituted a fair measure of the present employees' sentiment. Accordingly, the Board concluded that "it would best effectuate the policies of the Act to set aside the earlier election and to direct a new election (A. 6)."

B. The District Court's Decision

On April 5, 1970, the Union initiated the present action in the District Court for the District of Columbia, seeking a mandatory injunction to compel the Board to issue a tally of ballots and certify the results of the original election, and to restrain the Board from holding a rerun (A. 69-77). In support of this request, the Union urged that the Board had contravened both the statute and the applicable precedent by setting aside an otherwise valid election because of a change in employee complement. The Board responded that the district court was without jurisdiction over the subject matter of the action and that, in any event, in the special circumstances of this case, the Board's decision was fully in accord with the purposes of the Act (A. 77-100). However, the Board further added that (A. 80 n. 1):

> In [setting aside the election], the Board, in effect, declined to review the Trial Examiner's conclusions with respect to the challenged ballots. Accordingly, if this Court should ultimately direct the Board to reinstate the original election, it would first be necessary to remand the case to the Board for the purpose of ruling on the challenges.

On August 6, 1970, the District Court issued a memorandum opinion, granting the Union's motion for summary judgment, directing the Board to

"open the ballots and otherwise certify the results of the election of March 29, 1968," and ordering the Union to prepare an appropriate order (A. 106-119). The Union then submitted such an order, which the Board opposed on the ground that the case should properly be remanded to the Board for initial consideration of the parties' exceptions to the Trial Examiner's rulings on the challenged ballots (A. 119-121). On August 28, the District Court entered the Union's proposed order, directing the Board to "expeditiously open the challenged ballots as recommended by the Trial Examiner." (A. 125). It is from this order, and from the underlying refusal to direct a remand, which the Board now appeals (A. 126).

ARGUMENT

THE DISTRICT COURT ERRED IN REFUSING TO REMAND THE CASE TO THE BOARD FOR INITIAL CONSIDERATION OF THE PARTIES' EXCEPTIONS TO THE TRIAL EXAMINER'S RULINGS ON THE CHALLENGED BALLOTS

The single issue presented here is whether, in setting aside the original election and directing that a rerun be held, the Board also considered and passed upon the parties' exceptions to the Trial Examiner's rulings on challenged ballots. If the Board did not, then the District Court's order that the ballots be opened and counted pursuant to the rulings of the Examiner, and that the election results be certified, is plainly premature and the case must be remanded to the Board for initial consideration of the issues raised by the exceptions. For it has long been established that "the law has not committed the decisional process to the Trial Examiner. Administration of the Act has been reposed in the Board." *Warehousemen and Mail Order Employees, Local No. 743, IBT v. N.L.R.B.*, 112 U.S. App. D.C. 284, 302 F.2d 865, 869 (1962); *Oil & Chemical & Atomic Workers, Local 4-234 v. N.L.R.B. (Allied Chemical Corp.)*, 124 U.S. App. D.C. 113,

115-116, 362 F.2d 943, 945 (1966). Thus, absent a determination by the Board, both the Union and the employer have been denied the agency decision which the Act contemplates.

We submit that the Board's decision, on its face, reveals that the required determination was never made. As described above, the Board's sole mention of the Trial Examiner's election rulings was a straightforward factual restatement: "The Trial Examiner . . . recommended that four challenges be sustained and that three ballots be opened in order to ascertain whether the Union won the election." (A. 5-6). In the very next paragraph, the Board totally abandoned this issue turning to the contention of Upshur, who had purchased Thomas' operations after the election, that because of "substantial change in the composition of the unit" a new election would be appropriate (A. 6). The Board, contrary to the Trial Examiner, then proceeded to sustain this contention, concluding that the original election among Thomas' employees was not a valid reflection of Upshur's current employees' desires (A. 6).

Against this background, it seems plain beyond question that the Board never reached the issues raised by the seven challenged ballots, filed by both the Union and the employer. Each of these challenges presented a separate, detailed factual problem,[6] the resolution of which was totally superfluous to the Board's ultimate conclusion – that the election in which the ballots had been cast was itself a nullity. It is simply not reasonable to assume that the Board actually reviewed a series of complex factual issues which had been, in effect, rendered academic by its broader determinations. Such an assumption would be unwarranted in the case of

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[6] The exceptions simply renewed all the factual issues inherent in the challenges themselves: *i.e.*, whether two employees were supervisors and whether five others had been permanently laid off prior to the election.

a reviewing Court of Appeals – for "it is a uniform course of appellate review procedure to decline to review questions not necessary to a decision by an appellate court." *Highland Supply Corp. v. Reynolds Metals Co.*, 327 F.2d 725, 729 (C.A. 8, 1964) – and it is equally inappropriate with respect to the Board's review of a Trial Examiner's decision.

Indeed, in an earlier decision, the Board expressly articulated the view that resolution of challenged ballots is unnecessary and irrelevant when the underlying election is invalidated. See *Clippard Instrument Laboratory, Inc.*, 94 NLRB 6 (1951). There, the Regional Director recommended that the election be set aside, but refused to rule upon 24 challenged ballots. Rejecting the employer's contention that such a ruling would be useful in the rerun election, the Board explained as follows (94 NLRB at 6-7):

> Employees who voted and whose ballots were challenged at the first election might not appear at the polls to vote at a new election. If, however, they do vote at the new election, it does not follow that the ballots will be challenged, or that the challenges to the ballots, if there be any, will be for the same reasons as those given at the first election. We therefore see no advantage in resolving these questions of voting eligibility at this time and find no merit in the employer's contention.

In the instant case, of course, the above reasoning applies with even greater force; for, in addition to the factors cited by the Board in the *Clippard* case, here there had been a turnover of Thomas' eligible voters of over 45 percent (only 90 of 167 were rehired by Upshur), leaving no possible practical reason for ruling on the challenges and, indeed, rendering such determination an exercise in futility. Again, it is simply not reasonable to assume that the Board reached the question of the challenged ballots.

The District Court's contrary conclusion was apparently based upon the introductory language in the Board's decision, *i.e.* the Board "adopts the findings, conclusions and recommendations of the Trial Examiner only to the extent consistent herewith." (A. 2). Thus, after citing this language, the District Court stated (and this was its only possible reference to the problem) that "the Examiner's findings regarding the challenged ballots were not disputed or questioned by the Board." (A. 109). The district court then seemingly takes the view that, in light of the Board's introductory language, all findings of the Trial Examiner must be deemed "consistent herewith" and thus adopted, unless the Board specifically "disputed" or "questioned" them.

This is, we submit, an unreasonably and unsupportably narrow construction of the Board's language. The phrase "consistent herewith," given its everyday dictionary meaning–*i.e.*, "agreeing, in harmony, in accord, compatible"[7]–does not call for express treatment of every issue as a prerequisite to avoiding adoption of all the Trial Examiner's rulings. Rather, when the Board's disposition of a case is, as a whole, "inconsistent" with that of the Trial Examiner, many of the Trial Examiner's intermediate conclusions will necessarily be rendered also "inconsistent" or "incompatible" or not "in harmony"–*even if no specific ruling is made thereon by the Board.* Here, the plain fact is that the Board's total disposition of the case – setting aside the election and directing a rerun – was inconsistent with the Trial Examiner's recommendation that the election be certified, making his further rulings on the challenged ballots totally immaterial. To conclude in this context that the Board gratuitously reviewed and adopted the Trial Examiner's findings on challenged ballots would seriously distort the meaning of the "consistent herewith" language, while at the same time effectively depriving the parties of the statutory right to present their position to the Board.

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[7] Webster's New World Dictionary (1968 Ed.).

Indeed, the obvious purpose of the introductory language in the Board's decision (and the reason why such "short form" adoptions have been consistently upheld by the Courts of Appeals) is to relieve the Board of the "severe burden" of specifically detailing its rulings on every exception to the trial examiner's recommendations. *Borek Motor Sales, Inc. v. N.L.R.B.*, 425 F.2d 677, 681-682 (C.A. 7, 1970).[8] The District Court's approach would, in effect, defeat this purpose by imposing upon the Board the burden of specifically detailing its disavowal of every ruling by a Trial Examiner, despite the fact that such rulings are, on their face, not "consistent" with the Board's decision. Such a result is neither desirable as a matter of practical administrative policy, nor justified on the particular facts of this case.[9]

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[8] Accord: *Division 1142, Motor Coach Employees v. N.L.R.B.*, 111 U.S. App. D.C. 68, 72, 294 F.2d 268 (1961); *N.L.R.B. v. Process Corp.*, 412 F.2d 215, 217 (C.A. 7, 1969); *American President Lines, Ltd. v. N.L.R.B.*, 340 F.2d 490, 491-492 (C.A. 9, 1965).

[9] The Union suggested in its pleadings below that the Board is foreclosed from presenting the instant argument because it made no objection to the portion of the Union's Statement of Facts Not In Dispute which declared that the Board had adopted the Trial Examiner's rulings on the challenged ballots. However, a party's failure to deny specifically certain allegations admits only well pleaded factual assertions, not legal conclusions or ultimate issues which only the court can decide. See *Newport News Shipbuilding and Dry Dock Co. v. Shauffler*, 303 U.S. 54, 57 (1938). Here, the Union's purported Statement of Facts Not In Dispute contained a series of allegations, including the one involved herein, setting forth as settled "facts" matters which were, in reality, the principle issues before the court – *e.g.*, "the election of March 29, 1968 was a valid election" (A. 104-105) – and which could not be deemed admitted by a failure to specifically contravene. Indeed, the Union's attempt to portray as an undisputed fact of the case the challenged ballot issue was manifestly inaccurate, for the Board's previously filed memorandum to the District Court had expressly stated that "the Board declined to review the Trial Examiner's conclusion with regard to the challenged ballots" and that "accordingly, if this Court should ultimately direct the Board to reinstate the original election, it would first be necessary to remand the case to the Board for the purpose of ruling on the challenges" (A. 80 n. 1; see *supra*, p. 4).

In conclusion, it should be stressed that the single issue involved herein is by no means trivial or academic or unnecessarily time-consuming. If the Board had not taken this appeal, but rather, proceeded to certify the results of the original election, and the Union was victorious, the employer (Uphshur) would then have an option (which it has repeatedly indicated its intent to exercise) to refuse to bargain as a means of testing the validity of the certification. See, *e.g.*, *Boire v. Greyhound Corp.*, 376 U.S. 473, 476-479 (1964); *McCulloch v. Libby-Owens-Ford Glass Co.*, _____ U.S. App. D.C. _____, 403 F.2d 916, 917 (1969). In an ensuing unfair labor practice proceeding, the employer would undoubtedly contend, both before the Board and a reviewing Court of Appeals, that it had been denied fair opportunity to present its position on challenged ballots to the Board – a contention which, as demonstrated at length above, has real merit and might well result in the blocking of a bargaining order.[10] Thus, this appeal, far from obstructing or delaying justice, will hopefully expedite the implementation of employee rights by allowing the Board to pass upon the challenged ballots and to certify the results of the election in a manner which will be free from question.

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[10] Compare the sequence of events in *I.U.E. v. N.L.R.B. (Athbro Precision Engineering Corp.)*, 67 LRRM 2361 (D. D.C., 1968), wherein the District Court ordered the Board to certify the results of an election which the Board had set aside because of certain improprieties in the balloting procedures. The Board acquiesced, the union won the election, and the employer refused to bargain, thereby triggering an unfair labor practice proceeding in which the Board found a violation. On review, the Court of Appeals for the First Circuit initially indicated its view that the original Board order setting aside the election was justified and that, therefore, a bargaining order should not be enforced. However, noting that the employer had been an intervenor in the District Court proceeding and had taken no appeal therefrom, the Court concluded that the employer was foreclosed from further protesting the issue. *N.L.R.B. v. Athbro Precision Engineering Corp.*, 423 F.2d 573 (C.A. 1, 1970). Here, by contrast, the employer did not intervene in the District Court and, accordingly, a Court of Appeals presumably would be free to reach the merits of the election issues in a subsequent unfair labor practice case.

CONCLUSION

For the foregoing reasons, the Board respectfully submits that District Court should be directed to remand the case to the Board for consideration of the challenged ballots.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
GLEN M. BENDIXSEN,
Chief of Special Litigation,
THOMAS E. SILFEN,
Attorney,
National Labor Relations Board.

January 1971.

NO. 24,873

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA, UAW

Plaintiff-Appellees

v.

NATIONAL LABOR RELATIONS BOARD,

Defendant — Appellant

On Appeal from an Order of the
United States District Court for the
District of Columbia

BRIEF FOR INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW

Stanley Lubin
8000 East Jefferson Avenue
Detroit, Michigan 48213

George Arnold
6404 Wilshire Boulevard
Los Angeles, California

Attorneys for International Union
United Automobile, Aerospace and
Agricultural Implement Workers
of America, UAW

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TABLE OF AUTHORITIES CITED

(All cases are principally relied upon)

STATEMENT OF ISSUE PRESENTED

Whether the District Court was correct in ordering the Board to open and count the ballots of employees Dickey, Whitlock and Wilkens?

Plaintiff-Appellee respectfully submits that the answer to this question is "YES."

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This case is before the Court for the first time.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 24,873

UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW

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v.

NATIONAL LABOR RELATIONS BOARD,

Defendant – Appellant.

On Appeal from an Order of the United States District Court for the District of Columbia

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BRIEF FOR INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW

REFERENCE TO RULINGS

The decision and judgment of the United States District Court for the District of Columbia is not yet officially reported. The Decision issued on August 6, 1970 and is unofficially reported at 74 LRRM 3072. The Order granting Judgment in favor of plaintiff was entered on August 28, 1970 (A 106-119, 125).[1/] The Decision and Direction of Election was entered

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1. "A" references are to the Appendix filed herein.

by the Board on December 11, 1969 and is reported at 179 NLRB #165. The UAW's Motion for Reconsideration or to Reopen the Record was denied on March 12, 1970.

STATEMENT OF THE CASE

I. The Facts

An NLRB-conducted representation election was held amongst the production and maintenance employees of the Thomas Engine Co. ("Thomas") on March 29, 1968. 157 of the approximately 168 eligible voters cast ballots; 74 of which were for the UAW, 76 of which were for "no union," 7 of which were challenged and 1 of which was void (A 5). Of the seven challenges, 2 were lodged by the union, and 5 by the employer. The union contended that voters Byers and Stegmeir were supervisors and, therefore, ineligible; Thomas contended that voters Bratten, Coleman and Whitlock had been permanently laid off and that voters Dickey and Wilkens had been lawfully discharged and therefore all 5 were ineligible (A 44-48). In August 1968, a hearing was ordered on the challenges. The hearing was consolidated with the pending unfair labor practice hearing involving the same parties and was set for September 16, 1968 (A 70).

Due to numerous employer-requested delays, the Hearing was not held until December 17, 1968. These delays, along with others which followed the opening of the hearing are summarized in the table below:

Original Deadline	Requested Delay [2]	Time Requested	Disposition and Revised Deadline
1. Hearing date 9-16-68	Continuance	30 days	Granted 10-15-68 (A 70)
2. Hearing date 10-15-68	Continuance	30 days	Granted 11-19-68 (A 71)
3. Hearing date 11-19-68	Continuance	"at least" 30 days	Denied (A 71)
4. Hearing date 11-19-68	Continuance	"at least" 30 days	Granted 12-17-68 (A 71)
5. Hearing Date 12-17-68	Adjournment of Hearing	3 weeks	Granted 1-14-69 (A 71)
6. Brief due to TX 2-17-69	Extension of Time	30 days	Granted 3-10-69 (A 71)
7. Exceptions Due to Bd. 5-18-69	Extension of Time	30 days	Granted 6-9-69 (A 71)
8. Exceptions Due 6-9-69	Extension of Time	10 days	Granted 6-16-69 (A 72) [3]

Thus, from the date of the election in March 1968, it took 20 months to obtain the Board's decision on the challenged ballots and other issues. Of this time 6 months were wasted waiting out employer-obtained delays, and another 12 months were wasted waiting for the Regional Director, the Trial Examiner and the Board to decide the questions presented for their action.

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2. All requests save the first were filed by Upshur, the successor to Thomas. The first was filed by Thomas.

3. All requests with the possible exception of the second, were objectioned to by the UAW.

Only the Trial Examiner acted reasonably. He decided the case within 5 weeks after receiving the parties' briefs. The Regional Director and Labor Board respectively took 5 months and 6 months to perform their functions.

At the time of the election, there were approximately 167 eligible voters. (No exact figure is available. This estimate is based on the Board's election Talley Sheet which is not necessarily accurate.) When Thomas closed on September 9, 1968, there were 120-130 employees in the unit (A 4). On September 25, 1968, when Upshur assumed control, it retained 90 former Thomas employees and 7 new employees. Within a few days thereafter it hired an additional 25 former Thomas employees, bringing the total to 115 former Thomas employees of 122 employees in the unit (A 72-74).

II. The Trial Examiner's Decision

The Trial Examiner ruled that three of the seven challenges should be overruled and those ballots opened. Specifically, he ruled that Dickey and Wilkens had been discharged for engaging in Union activities, this in violation of §§8(a)(3) and (1) of the Act. It follows from that conclusion that their ballots should be opened (A 23-27, 40-41, 56, 60). He also ruled that employee Whitlock had not been permanently laid off, but rather had a reasonable expectancy of recall and that his ballot should be opened (A 43-44, 60).

III. The Board's Decision

The Labor Board affirmed all portions of the Trial Examiner's Decision except for the recommended remedy and the recommendation concerning certification of the election results. It stated that:

> "The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, the briefs, and the entire record in this proceeding, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner only to the extent consistent herewith." (A 2)

The Board then specifically rejected the Trial Examiner's recommended remedy[4/] and his recommendation regarding certification. It based its decision regarding certification on two grounds--first, the changed circumstances caused by Upshur's take-over of the operation[5/] and the alleged need to protect the "wishes" of 7 new employees at the expense of the 90 remaining employees; and second, the 20 month lapse in time between the election and the decision. Accordingly, the Board ordered a new election. It did so without setting aside the old election and without disputing the Trial Examiner's findings regarding the challenged ballots.

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4. The Union filed a petition for review of that portion of the Board's Order in the Ninth Circuit. Oral argument was held on January 15, 1971 in Los Angeles and the court has taken the case under advisement.

5. It did this despite finding that Upshur took "with knowledge" of Thomas' unfair labor practices and that Upshur's plant manager was the individual employed by Thomas who was responsible for many of the unfair labor practices (A 2, n.2, 20-40).

IV. The District Court's Decision

Upon a Complaint brought by the UAW, the District Court, per Judge Parker, ruled that the 3 ballots should be opened and the election results certified. The Court reasoned that the Board had exceeded its statutory authority in refusing to certify the results of a valid election, pointing out that:

> "The Examiner's findings regarding the challenged ballots were not disputed by the Board. No objections were filed by either party contesting the validity of the March 29, 1968, election. Nor was there any finding or even suggestion of any improper conduct by anyone influencing the employees' vote, the election procedures or the tallying of the vote." (A 109)

The court, after setting out the applicable law and applying it to the instant matter, stated:

> "What the Board seeks is unrestrained authority to refuse to certify an election whenever it concludes, in its unbridled discretion, that the effects, rather than the election itself, are in some undefined manner, 'unfair.' To this Court it appears that the results of the Board's approach are prejudicial to the Union as well as to the statutory purpose..." (A 118. Emphasis in original.)

The court thereupon "directed" the Board "to open the challenged ballots and otherwise certify the results of the election of March 28, 1968." (A 118).

V. The District Court's Order

Consistent with the directive of the court, counsel for the UAW prepared and submitted an order which required the Board to open the 3 ballots and certify the election results. (A 125) The Board, asserting that its

adoptive language (quoted above, p. 5) was a mere "'boilerplate' formality," claimed that it did not pass on the challenged ballot questions and that the court should remand the case to the Board so that it would have the opportunity to do so (A 119-121). Aside from a short equivocal footnote of no consequence in its earlier memorandum (A 80, n. 1), this was the first instance at which the Board insisted that it had not ruled on the challenged ballots. The Union filed a memorandum supporting its proposed order (A 121-124), and on August 28, 1970, Judge Parker signed the order (A 125).

Sixty days later the Board filed the instant appeal (A 126).

ARGUMENT

The District Court Was Correct In Ordering The Board To Open And Count The Ballots Of Employees Dickey, Whitlock & Wilkens

The Board, in appealing from the decision of the District Court, is limiting its appeal to one issue--whether the court below properly ordered the Board to open the 3 challenged ballots. No challenge is being made to the basic decision of the court ordering the Board to treat the March 1968 election as valid and to certify the results thereof. The Board is seeking an order remanding the case to it with instructions to determine the eligibility of the seven voters whose ballots were challenged. In arguing for the remand the Board asserts that it has not yet considered the eligibility questions and that, as a matter of administrative law, it has

the duty and right to decide such questions in the first instance.[6] However, as we show below, the Board's factual assertions are misplaced: First, because the Board has considered and decided the question at issue; and second, because even if it has not, it states in its Decision that it has and the Board is bound thereby.

We submit that the Board's Decision means precisely what it says. The Board specifically stated that it was affirming all of the Trial Examiner's rulings except those with which it stated its disagreement. In the remaining paragraphs of its decision the Board spelled out only two specific disagreements with the Trial Examiner; part of his recommendation concerning the remedy and his recommendation concerning certification of the election results. Thus, the Board clearly "adopted" the remaining "findings, conclusions and recommendations" of the Trial Examiner, including those recommendations concerning the challenges as set forth at page A 60. Indeed, the Board, in addition to generally adopting the findings and recommendations concerning the challenges, specifically referred to them in its decision:

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6. We do not argue with the proposition of law. Our contention is based upon the factual premise that the Board has already decided the eligibility issues. The District Court agreed with our position. Therefore, a remand would be incorrect in this case.

7. The UAW has sought review of this portion of the Board's Decision and Order. Oral argument was held by the Ninth Circuit on January 15, 1971 (#25,706).

> "The Trial Examiner...recommended that 4 challenges be sustained and that 3 ballots be opened..."(A 6).

Although the Board then proceeded to specifically refuse to direct certification of the election results, it stated nothing further about the challenges. Common sense dictates that, by generally adopting all findings save those specifically excepted to and by specifically reciting the findings in question without criticizing, altering, rejecting or commenting on them, the Board has, in fact, adopted them.

Further weight is given this argument by the fact that two of the challenges revolved around the questions concerning the discharge of the two voters. The Trial Examiner resolved those questions in the portion of his decision dealing with the unfair labor practice charges (A 23-27) and relied upon his disposition of the 8(a)(3) questions in determining their eligibility to vote (A 40-41). The Board, utilizing the language referred to above (supra, p. 5) "adopted" the Trial Examiner's determination that the 2 voters Dickey and Wilkens were illegally discharged. It follows from such a finding that they were eligible to vote. Therefore, the Board has certainly determined the eligibility status of those two employees. Clearly, the Board cannot argue that it passed on their status as employees without comment by generally "adopting" the Trial Examiner's recommendations while at the same time, it did not pass on Whitlock's status, despite that very same "adopting" language.

The Board argues, however, that the Board, by sustaining Upshur's contention regarding certification, in effect rejected the Trial Examiner's findings and recommendations regarding the challenged ballots. This argument overlooks the fact that the Trial Examiner was reversed only insofar as his recommendation concerned certification of the election results and his recommendation concerning the remedy. As noted above, the Board recited the Trial Examiner's findings regarding the challenges and certification. However, it chose to reverse him only on the latter points and it did so in unambiguous, specific terms. Its silence on the challenged ballot issues can only infer affirmance.

Common sense dictates that the Board, if it feels no need to pass on an issue, should simply state something to the effect that it is neither adopting nor rejecting the Trial Examiner's finding on that issue. This is precisely what the Board did in Omni Spectra, Inc., 176 NLRB #24 (copy attached as Supplemental Appendix, infra, p. S 1, et seq.), remanded for reconsideration on another point, 427 F.2d 1330 (6th Cir., 1970). There the Board specifically indicated that it saw no need to decide a particular issue. Even more on point is Clippard Instrument Laboratory, Inc., 94 NLRB 6, where the Board decided to conduct a rerun election and further decided to refrain from deciding the issues raised by the challenges to 24 ballots. The Board stated, in clear language, that, because of the facts in that case, it saw no reason to determine the eligibility

of the 24 challenged voters. Here, the Board did have to determine the status of at least 2 of the challenged voters, and in fact did so. Here too, the Board did not state that it was not passing on the challenges. Had it desired so to act it should have either said so as in Omni Spectra, or at least referred the parties to its rationale in Clippard Instruments. By failing to so act, the Board must have "adopted" the questioned findings of the Trial Examiner.

Even if we assume, however, that the Board, in fact, did not decide the eligibility questions, the point remains that the Board stated that it did decide these questions. The Board argues that the "adopting" language was merely "introductory" and infers that it is not necessarily entitled to the same weight as the remainder of the decision (Board's brief, pp. 8-9). This is but a variation of its argument below concerning the "boilerplate" nature of the Board's language (see A 120). With all due respect to the Labor Board, whether its language is "boilerplate," "short form" or "introductory," it is part and parcel of the decision and the Union is entitled to rely on it. When the Board states that it is "adopting" a finding of the Trial Examiner, it must be held to mean what it states. 7/

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7. The dictionary definition of "consistent herewith" does not detract from our argument. Viewed especially in light of the fact that the Board had decided at least some of the challenges by virtue of its 8(a)(3) findings regarding Dickey & Wilkens, it is certainly clear that at least some of the challenges were decided and the Trial Examiner's findings were "consistent [t]herewith."

In Service v. Dulles, 354 U.S. 363, the Supreme Court held that the State Department was bound by its own rules and regulations. That case involved the removal of a Foreign Service Officer on findings made by the Loyalty Review Board of the Civil Service Commission. The State Department Review Board had earlier ruled in favor of the officer. State Department Regulations provided that removal could occur only if its Review Board found adverse to the officer. The Court held that the Department was bound by its own regulation and could not ignore them. By the same token, the Labor Board cannot issue a decision, state that it adopts certain findings, conclusions and recommendations, admit these facts in court [8/] and then, when it loses the case, suddenly cry out that it did not mean it. Simple justice requires that an Agency of the United States Government be held to mean what it says.

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8. Notwithstanding the Board's assertions to the contrary, points 6 and 7 of our Statements of Facts Not In Dispute (A 104) do constitute factual assertions, to wit, assertions that the Trial Examiner and the Board made certain findings. The legal conclusion flowing from these facts is that the Board should be ordered to simply open the 3 ballots. The Board's apparent argument that because one point is conclusionary, all are, (p. 9, n. 9) serves only to dramatize the weakness of its argument.

CONCLUSION

For the above reasons, plaintiff-appellee respectfully requests that the Judgment and Order of the District Court be affirmed and that the Board should be ordered to open and count the ballots of Dickey, Whitlock & Wilkens and certify the election results. In the posture of this case, considering the multiple Board-approved delays, the lengthy Board-created delays, including the delay created by the Board's waiting 60 days before filing its Notice of Appeal herein, it would be improper to remand this matter to the Board. We note that nearly 3 years have passed since the March, 1968 election and the employees still do not know whether or not the UAW won the right to represent them.[9] A remand will only serve to add more delay to this overly-long proceeding.

However, should this Court decide that the Board is, nevertheless, entitled to a remand, we respectfully suggest that the remand order

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9. The Board is suddenly worried about what might happen if the UAW was certified and the employer refused to bargain in order to test the certification. We submit that such concern is not supported in the record and is unwarranted. The employer had the opportunity to intervene in the proceedings below, but chose not to and would therefore be in a poor position to challenge the validity of these proceedings. Second, should the UAW win the election and the employer refuse to bargain, the employees can strike in protest of such decision. Third, should the UAW lose the election the proceedings will draw to a quick conclusion. Fourth, the employer may decide to bargain. In any event, speculating over future possibilities is really of no moment here. We are concerned solely with the propriety of the Board's past action.

contain a provision requiring the Board to decide the challenged ballot questions within 30 days after receipt of the remand. Further delay beyond that point would be totally unreasonable and wholly unconscionable (see, e.g., 5 U.S.C. §555(b)).

Respectfully submitted,

Stanley Lubin
8000 East Jefferson Avenue
Detroit, Michigan 48213

George Arnold
6404 Wilshire Boulevard
Los Angeles, California

Attorneys for International Union

By Stanley Lubin
Stanley Lubin

Dated: February 17, 1971

CERTIFICATE OF SERVICE

This is to certify that copies have been sent, certified mail, return receipt requested, upon: Marcel Mallet-Prevost, National Labor Relations Board, 1717 Pennsylvania Ave., N.W., Washington, D.C.

Stanley Lubin
Stanley Lubin

Dated: February 17, 1971

SUPPLEMENTAL APPENDIX

176 NLRB No. 24

D-1970
Detroit, Michigan

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

OMNI SPECTRA, INC.

and

Case 7-CA-6811

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW)

DECISION AND ORDER

On December 23, 1968, Trial Examiner Abraham H. Maller issued his Decision in the above entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, but recommending that the complaint be dismissed. He also found that the Respondent had not engaged in certain other unfair labor practices. Thereafter, the General Counsel filed limited exceptions to the Trial Examiner's Decision and a supporting brief,[1/] and the Respondent filed cross-exceptions and an answering brief.

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1. The General Counsel excepts only to the Trial Examiner's refusal to issue a remedial order for the violation he found of Section 8(a)(1).

Pursuant to the provisions of Section 3(b) of the Act, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and with the limited exception noted herein, adopts the findings,[2] conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and orders that the complaint be, and it hereby is, dismissed.

Dated, Washington, D.C. May 26, 1969

Frank W. McCulloch, Chairman

Howard Jenkins, Jr., Member

Sam Zagoria, Member

NATIONAL LABOR RELATIONS BOARD

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2. The Respondent excepts only to the finding of this single 8(a)(1) violation. As we agree with the Trial Examiner that, in any event, the violation found would be too isolated to warrant the issuance of a remedial order, we feel that no purpose would be served by passing on the correctness of his finding. We therefore decline to pass on or adopt it.